

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

PLATINUM REALTY AND HOLDINGS,  
LLC,

Plaintiff,

vs.

RANDALL M. LEE, et al.,

Defendants.

Case No.: 2:13-cv-00535-GMN-NJK

**ORDER**

Pending before the Court is the Ex Parte Motion for Temporary Restraining Order (ECF No. 20) and Motion for Preliminary Injunction (ECF No. 21) filed by Plaintiff Platinum Realty and Holdings, LLC ("Plaintiff").

**I. BACKGROUND**

On October 11 1999, Defendant Randall M. Lee ("Lee") obtained title to real property located at 1070 Havenworth Avenue, Las Vegas, Nevada 89123 (the "Property") via Quit Claim deed. (Compl. ¶ 5, ECF No. 1; Req. for Jud. Notice, Exhibit B, ECF No. 6.) On October 23, 2004, Lee executed a deed of trust, which was recorded as an encumbrance to the Property on November 8, 2004. (Req. for Jud. Notice, Exhibit C, ECF No. 6.) Defendant Wells Fargo Bank, N.A. ("Wells Fargo") is the current beneficiary and successor in interest to that deed of trust. (Compl. ¶ 10, ECF No. 1.)

The Property was subject to certain HOA dues owed to the Silverado Homeowners Association (the "HOA"), which Lee failed to pay. (Compl. ¶ 7, ECF No. 1.) On September 2, 2011, the HOA recorded a homeowner's association lien (the "HOA Lien") against the Property. (Compl. ¶ 7, ECF No. 1.) On September 18, 2012, the HOA foreclosed on the HOA Lien, and subsequently recorded a Trustee's Deed on September

1 19, 2012 transferring its interest in the Property to Plaintiff as the successful bidder in a  
2 foreclosure sale. (Compl. ¶¶ 11, 13, ECF No. 1.)

3 On February 13, 2013, Plaintiff filed the instant action seeking quiet title and a  
4 declaration that pursuant to NRS 116.3116, et seq., “[t]he failure by [Wells Fargo] to pay  
5 the sums required under said statute by the HOA Lien foreclosure sale date constitutes a  
6 loss of [Wells Fargo]’s security.” (Compl. ¶ 25, ECF No. 1.) Alternatively, Plaintiff  
7 alleges that Wells Fargo’s “failure to cure the Superpriority Lien of the HOA under NRS  
8 116.3116 constitutes a loss of the security of [Wells Fargo] upon the foreclosure of the  
9 HOA Lien.” (Compl. ¶ 26, ECF No. 1.)

10 Wells Fargo recorded a Breach and Election to Sell on October 24, 2012, and is  
11 now proceeding to foreclose on the Property. (Compl. ¶ 15, ECF No. 1.) Plaintiff asserts  
12 that the pending foreclosure sale of the Property is set to be conducted by Wells Fargo at  
13 10:00 a.m. on January 15, 2014. (Motion for Temp. Restraining Order 1:21-25, ECF No.  
14 20.) In an effort to enjoin Wells Fargo from conducting this sale, on January 10, 2014,  
15 Plaintiff filed the instant Ex Parte Motion for Temporary Restraining Order and Motion  
16 for Preliminary Injunction. (ECF No. 20; ECF No. 21.) This written order follows.

## 17 **II. LEGAL STANDARD**

18 Preliminary injunctions and temporary restraining orders are governed by Rule 65  
19 of the Federal Rules of Civil Procedure, which provides that a “court may issue a  
20 preliminary injunction only on notice to the adverse party.” Fed. R. Civ. P. 65(a)(1).

21 In contrast, a “court may issue a temporary restraining order without written or  
22 oral notice to the adverse party or its attorney only if: (A) specific facts in an affidavit or  
23 a verified complaint clearly show that immediate and irreparable injury, loss, or damage  
24 will result to the movant before the adverse party can be heard in opposition; and (B) the  
25 movant’s attorney certifies in writing any efforts made to give notice and the reasons why

1 it should not be required.” Fed. R. Civ. P. 65(b)(1). A temporary restraining order  
2 “should be restricted to serving [its] underlying purpose of preserving the status quo and  
3 preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.”  
4 *Granny Goose Foods, Inc. v. Bhd. of Teamsters Local No. 70*, 415 U.S. 423, 439 (1974).

5 “A plaintiff seeking a preliminary injunction must establish that he is likely to  
6 succeed on the merits, that he is likely to suffer irreparable harm in the absence of  
7 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in  
8 the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).  
9 Injunctive relief is “an extraordinary remedy that may only be awarded upon a clear  
10 showing that the plaintiff is entitled to such relief.” *Id.* at 22. “[C]ourts must balance the  
11 competing claims of injury and must consider the effect on each party of the granting or  
12 withholding of the requested relief.” *Id.* at 24 (internal quotation marks omitted).

13 The Ninth Circuit has held that “serious questions going to the merits and a  
14 hardship balance that tips sharply toward the plaintiff can support issuance of an  
15 injunction, assuming the other two elements of the *Winter* test are also met.” *Alliance for*  
16 *the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011) (internal quotation  
17 marks omitted).

18 “In deciding a motion for a preliminary injunction, the district court ‘is not bound  
19 to decide doubtful and difficult questions of law or disputed questions of fact.’” *Int’l*  
20 *Molders’ & Allied Workers’ Local Union No. 164 v. Nelson*, 799 F.2d 547, 551 (9th Cir.  
21 1986) (quoting *Dymo Indus., Inc. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964)).

22 “The urgency of obtaining a preliminary injunction necessitates a prompt  
23 determination and makes it difficult to obtain affidavits from persons who would be  
24 competent to testify at trial.” *Flynt Distrib. Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th  
25

1 Cir. 1984). “The trial court may give even inadmissible evidence some weight, when to  
2 do so serves the purpose of preventing irreparable harm before trial.” *Id.*

### 3 **III. DISCUSSION**

4 In this case, the Court finds that Plaintiff has met its burden under *Alliance for the*  
5 *Wild Rockies* and *Winter* and that a temporary restraining order is necessary in this case  
6 to maintain the status quo through the pendency of this action. However, pursuant to  
7 Rule 65(a) of the Federal Rules of Civil Procedure, until Defendants receive notice of the  
8 Motion for Preliminary Injunction, the Court may not issue an order on that motion.

#### 9 **A. Serious Questions Going to the Merits**

10 Plaintiff seeks quiet title to the Property and a declaration that pursuant to NRS  
11 116.3116(2)(c), foreclosure on a nine-month “super priority” HOA lien extinguishes all  
12 junior liens, including a first recorded mortgage lien. In contrast, Wells Fargo asserts that  
13 NRS 116.3116(2)(c) merely creates a payment priority to ensure that an HOA is  
14 compensated for any loss or maintenance on a property that is in foreclosure or vacant,  
15 rather than creating a superior security interest that if foreclosed upon would extinguish a  
16 prior recorded security interest.

17 Section 116.3116(2)(c) of the Nevada Revised Statutes expressly provides that an  
18 HOA lien is “prior to all security interests described in paragraph (b) to the extent of the  
19 assessments ... which would have become due ... during the 9 months immediately  
20 preceding institution of an action to enforce the lien.” The type of security interest  
21 described in paragraph (b) is a “first security interest on the unit recorded before the date  
22 on which the assessment sought to be enforced became delinquent.” Wells Fargo holds  
23 such an interest. The statute, however, fails to provide any guidance concerning whether  
24 a foreclosure on the “super priority” HOA lien extinguishes a first security interest or  
25

1 merely ensures first payment of that portion of the HOA lien at the foreclosure of the first  
2 security interest.

3       Given the lack of guidance on this issue provided in the statute and the varying  
4 interpretations that the Nevada state courts and the judges of this district have given for  
5 this statute, the Court finds strong questions going to the merits of Plaintiff's request for a  
6 declaration that a first recorded deed of trust is extinguished when an HOA forecloses on  
7 an HOA lien. *Compare SFR Investments Pool 1, LLC v. Wells Fargo Bank, N.A.*, No.  
8 2:13-cv-01153-APG-PAL (D. Nev. July 25, 2013) (concluding that the HOA had  
9 established a likelihood of succeeding on the merits of its claim that foreclosure of the  
10 super priority portion of the HOA lien extinguished a first recorded Deed of Trust)  
11 (attached as Exhibit 1), *and First 100, LLC v. Burns*, No. A677693 (8th Judicial D. Ct.  
12 Clark Cnty., Nev. May 30, 2013) (concluding that, pursuant to Chapter 116 of the  
13 Nevada Revised Statutes, the non-judicial foreclosure of an HOA lien extinguishes prior  
14 recorded security interests) (attached as Exhibit 2), *with Bayview Loan Servicing, LLC v.*  
15 *Alessi & Koenig, LLC*, No. 2:13-cv-00164-RCJ-NJK, 2013 WL 2460452 (D. Nev. June  
16 6, 2013) (granting summary judgment in favor of lender's assignee and holding that the  
17 foreclosure of an HOA lien did not extinguish the first mortgage) (attached as Exhibit 3).

#### 18       **B.     Likelihood of Irreparable Harm**

19       To carry its burden, Plaintiff must also establish that it will likely suffer  
20 irreparable harm without the issuance of injunctive relief. *Winter*, 555 U.S. at 21.  
21 Plaintiff must "demonstrate a likelihood of irreparable injury—not just a possibility—in  
22 order to obtain preliminary relief." *Id.* At bottom, Plaintiff must show that "remedies  
23 available at law, such as monetary damages, are inadequate to compensate for th[e]  
24 injury." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

1 Without the requested injunction, Defendants will likely sell the property at the  
2 pending foreclosure sale. Given the uncertainty in the law, Plaintiff will suffer  
3 irreparable harm if the courts determine that Wells Fargo's foreclosure extinguishes or  
4 encumbers their title in the Property. In addition, a foreclosure sale by Wells Fargo will  
5 likely add the purchaser at the sale as an additional party to the litigation, increasing the  
6 expense of litigation and further complicating the matter.

7 **C. Balance of Equities Tips Sharply Toward Plaintiff**

8 The balance of equities tips sharply in favor of Plaintiff because, without this  
9 injunction, Wells Fargo may sell the property and this sale may extinguish or encumber  
10 Plaintiff's interest and unnecessary increase the costs of litigation and complexity of the  
11 issues before the Court resolves the merits of Plaintiff's declaratory judgment action.

12 **D. Public Interest**

13 "The public interest analysis for the issuance of [injunctive relief] requires [district  
14 courts] to consider whether there exists some critical public interest that would be injured  
15 by the grant of preliminary relief." *Alliance for the Wild Rockies*, 632 F.3d at 1138  
16 (citation omitted). In this case, the Court finds no reason that the public interest would be  
17 harmed by the issuance of the requested injunction. Accordingly, the lack of harm to the  
18 public interest also supports Plaintiff's requested relief.

19 **IV. BOND**

20 Rule 65(c) of the Federal Rules of Civil Procedure requires that "[t]he court may  
21 issue a preliminary injunction . . . only if the movant gives security in an amount that the  
22 court considers proper to pay the costs and damages sustained by any party found to have  
23 been wrongfully . . . restrained." Fed. R. Civ. P. 65(c). Thus, the primary purpose of such  
24 a bond is to safeguard Defendants from costs and damages incurred as a result of a  
25 preliminary injunction improvidently issued.

1 Considering expenses were incurred by Wells Fargo in preparation for the  
2 foreclosure sale, the Court finds that a bond in an amount equal to \$500.00 is appropriate.  
3 Accordingly, this preliminary injunction will go into effect upon Plaintiff's posting of  
4 such a bond.

5 **IV. CONCLUSION**

6 **IT IS HEREBY ORDERED** that that Plaintiff's Ex Parte Motion for Temporary  
7 Restraining Order (ECF No. 20) is **GRANTED**.

8 **IT IS FURTHER ORDERED** that this Temporary Restraining Order will expire  
9 by its own terms in 14 days from the date of its issuance.

10 **IT IS FURTHER ORDERED** that Plaintiff shall serve its pending Motion for  
11 Preliminary Injunction (ECF No. 21) on all Defendants and file certification of said  
12 service on the docket by January 17, 2014. Defendants shall file a Response in  
13 opposition, if any, by January 27, 2014.

14 **IT IS FURTHER ORDERED** that a hearing on Plaintiff's pending motion for  
15 Preliminary Injunction (ECF No. 21) is set for Tuesday, January 28, 2014, at 2:00 PM.

16 DATED this 13th day of January, 2014.

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19 Gloria M. Navarro, Chief Judge  
20 United States District Judge  
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